IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

KEVIN S. CHANDLER,
Airman Basic (E-1), USAF
Appellant.

Crim. App. No. S32534

USCA Dkt. No. 20-0168/AF

BRIEF ON BEHALF OF APPELLANT

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THE STAFF JUDGE ADVOCATE NEGOTIATED THE INCLUSION OF AGGRAVATING EVIDENCE IN A STIPULATION OF FACT. OVER DEFENSE OBJECTION, AND AFTER DISPUTING THE DEFENSE'S VERSION OF EVENTS, THE STAFF JUDGE ADVOCATE PROVIDED POST-TRIAL ADVICE TO THE CONVENING AUTHORITY. DID THE STAFF JUDGE ADVOCATE'S PRETRIAL CONDUCT WARRANT DISQUALIFICATION?

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (hereinafter Air Force Court) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c) (2012). This Honorable Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

Airman Basic (AB) Kevin Chandler was tried by a military judge alone at a special court-martial convened at Tinker Air Force Base, Oklahoma, on March 22, 2018. In accordance with his pleas, he was found guilty of one charge and four specifications involving the use and distribution of marijuana and cocaine, all on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a; and

an additional charge and two specifications involving the use of marijuana and cocaine, each on a single occasion, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. (JA at 88.) The military judge sentenced AB Chandler to a bad conduct discharge, five months confinement, and forfeitures of $1,000 pay per month for five months. (JA at 119.) The convening authority approved the adjudged sentence. (JA at 31.) On January 13, 2020, the Air Force Court affirmed the findings and sentence. (JA at 12.) AB Chandler timely filed a petition for review, invoking this Court's jurisdiction pursuant to Article 67(a)(3), UCMJ. This Court granted review of his case on April 21, 2020. *United States v. Chandler,* 2020 CAAF LEXIS 227 (C.A.A.F. Apr. 21, 2020).

Statement of Facts

General Background

AB Chandler was exposed to drugs at an early age, as his drug-addicted single mother's inability to find a job often forced them to stay in halfway houses, shelters, and the residences of "drug friends." (JA at 174.) While attending high school in Oklahoma, AB Chandler began heavily using alcohol. (JA at 174-175.) Like his friends and family, he also used marijuana. (JA at 175.) AB Chandler disclosed

these facts to his Air Force recruiter, but he was nevertheless allowed to enlist due to his "honesty." (JA at 175.)

AB Chandler began his Air Force service with promise, as he was named dorm chief, won running competitions, and participated in various community events. (JA at 175.) However, while at Technical School, he was sexually assaulted by a fellow Airman; the effects of which were exacerbated due to a past molestation from his childhood. (JA at 174-175.) AB Chandler subsequently addressed his pain the way other adults in his life had—through substance abuse. (JA at 175.)

AB Chandler arrived at his first permanent duty station at Andersen Air Force Base (AFB), Guam, on April 9, 2016. (JA at 175.) Approximately eight months later, he took leave in Oklahoma and experienced medical issues, which resulted in his placement on "medical leave." (JA at 176.) He was subsequently directed to stay in Oklahoma and occupy himself pending further instruction. (JA at 176.) AB Chandler remained in a limbo status for several months, became depressed, and began reliving his sexual trauma. (JA at 176.) Eventually, he used marijuana as a coping mechanism and later became addicted to cocaine after an old high school friend

introduced him to the drug. (JA at 176.) AB Chandler was just 19 years old at this time. (JA at 120, 174.)

AB Chandler continued to use drugs while in Oklahoma and later provided cocaine to a friend from high school (a fellow Airman) and marijuana to some local friends. (JA at 121, 122.) After Air Force investigators discovered AB Chandler's illicit activities, he was "[v]ery cooperative" (JA at 90) and confessed to his crimes. (JA 161-163.) He later agreed to become a confidential informant (CI), conducting multiple operations for federal and local law enforcement against mid-level drug distributors. (JA at 94, 173, 176.) One of his handling agents attested that AB Chandler "took exceptional risk for his safety and well-being" during these operations, which ultimately resulted in the arrest of at least two drug traffickers, the seizure of drugs, and the recovery of numerous stolen vehicles. (JA at 173.) The stress of AB Chandler's dangerous work as a CI led to a relapse; however, he reported the relapse and continued with his rehabilitative efforts. (JA at 61, 64-65.)

Pretrial Activities and Court-Martial Proceedings

Prior to AB Chandler's court-martial, his trial defense counsel, Captain (Capt) Clayton Cox, engaged in several discussions with the government regarding a potential pretrial agreement (PTA). (JA at 33.) Trial defense counsel also exchanged several drafts of a potential stipulation of fact with the government. (JA at 33.) Approximately ten days before AB Chandler's court-martial, the Staff Judge Advocate (SJA), Lieutenant Colonel (Lt Col) Amer Mahmud, called Capt Cox to discuss the proposed stipulation. (JA at 24, 33.) Lt Col Mahmud had never discussed a stipulation of fact with Capt Cox before; all previous negotiations had been conducted by the Chief of Military Justice or trial counsel. (JA at 33.) Capt Cox had similarly never conversed with other SJAs about stipulations of fact. (JA at 33.) Nevertheless, Lt Col Mahmud led the government in its discussion of AB Chandler's proposed stipulation, insisting that the exhibit include how AB Chandler confessed to using cocaine approximately 150 times and marijuana approximately 40 times. (JA at 27, 33.) Capt Cox objected, noting that case law would preclude the presentation of such information due to a lack of corroboration. (JA at 27, 33.) This did not change Lt Col Mahmud's

position. (JA at 27, 33.) Capt Cox ultimately relented on the issue (JA at 33, 121) and a PTA was signed by the applicable parties. (JA at 179-181). Pursuant to this agreement, AB Chandler agreed to "[e]nter into a reasonable stipulation of fact with the government." (JA at 179.)

At trial, the military judge had AB Chandler confirm the stipulation of fact's citation to the 150 uses of cocaine (JA at 45, 55.) and the 40 uses of marijuana. (JA at 45-46, 51.) Assistant trial counsel later referenced the number of uses on at least six occasions during her sentencing argument (JA at 103, 106-107), to include her summation of the case:

> And the appropriate sentence for Airman Chandler after distributing cocaine to another Airman, disturbing [sic] marijuana to three civilians and using cocaine and marijuana about 190 times is eight months confinement, maximum forfeitures [sic], and a bad conduct discharge.

(JA at 107.)

In contrast, Capt Cox argued that the government's recommendation was disproportionate to AB Chandler's crimes and would not serve any rehabilitative purpose. (*See*, e.g., JA at 118.) Capt Cox further highlighted AB Chandler's troubled upbringing,

admissions of guilt, and willingness to expose himself to danger as a CI. (JA at 109-110, 114-117.)

The military judge ultimately sentenced AB Chandler to a bad conduct discharge, $1,000 forfeitures of pay per month for five months, and confinement for five months. (JA at 119.)

Post-Trial Processing

Prior to the clemency process, Capt Cox contacted the legal office regarding Lt Col Mahmud's pretrial participation. (JA at 24, 33.) Capt Cox did so to allow the legal office to find a different individual to complete the Staff Judge Advocate's Recommendation (SJAR), as Capt Cox contended that Lt Col Mahmud's role in negotiating details in the Stipulation of Fact made him a *de facto* trial counsel and thus disqualified him from participating in any post-trial review pursuant to Article 6(c), UCMJ, 10 U.S.C. § 806(c), and Rule for Courts-Martial (R.C.M.) 1106(b). (JA at 24.)

Despite Capt Cox's objections, Lt Col Mahmud elected to draft the SJAR. (JA at 19-20, 24.) In this SJAR, Lt Col Mahmud attested that "the evidence upon which the conviction is based is legally sufficient." (JA at 19.) Lt Col Mahmud further opined that the adjudged sentence "is appropriate for the offenses for which [AB

Chandler] was convicted" and recommended that the Convening Authority approve the sentence in its entirety. (JA at 19-20.)

In AB Chandler's clemency package, Capt Cox raised three issues for the convening authority's consideration, including opposition to Lt Col Mahmud's continued post-trial involvement. (JA at 21-26.) Lt Col Mahmud responded to Capt Cox's objections in the Addendum to the SJAR, opining that each was without merit. (JA at 28-30.) Regarding his pretrial involvement, Lt Col Mahmud confirmed that he had conversed with defense counsel regarding details in the stipulation of fact, but denied having anything other than an official interest in the case. (JA at 29.) He also justified his continued participation by opining that R.C.M. 705(d)(1) allowed an SJA to initiate "[p]retrial agreement negotiations," and characterized the stipulation of fact as "part of the defense offer for the pretrial agreement." (JA at 29.) Ultimately, Lt Col Mahmud did not change his earlier recommendation that the Convening Authority approve the adjudged sentence. (JA at 29.) The Convening Authority did not provide AB Chandler any clemency. (JA at 31.)

AB Chandler's Appeal to the Air Force Court

In his appeal before the Air Force Court, AB Chandler again alleged that Lt Col Mahmud's pretrial participation precluded him from providing post-trial advice. Lt Col Mahmud provided an affidavit in support of the government's answer, disputing AB Chandler's allegations as well as Capt Cox's version of events. (JA at 32.) Lt Col Mahmud contended that while he remembered calling Capt Cox to discuss the stipulation of fact, he did so as the "senior legal advisor to the special court-martial convening authority." (JA at 32.) He further claimed that he only called about the stipulation because respective counsel were unable to agree on terms, and that he wanted "to avoid any potential delays/costs to the government/negative mission impact." (JA at 32.) Lt Col Mahmud also asserted that there was a "mischaracterization" of his position, in that he never "insisted" that certain terms be included in the stipulation of fact. (JA at 32.) Rather, Lt Col Mahmud claimed he merely "highlighted options," and did not necessarily care whether there was a PTA or litigated trial. (JA at 32.)

In a split decision, the Air Force Court determined that AB Chandler had failed to meet his burden to show Lt Col Mahmud was

disqualified from providing post-trial advice. (JA at 9.) The court based its decision on several conclusions.

First, it opined that there was a "narrow factual basis" for Lt Col Mahmud's disqualification: a single point of contention during one phone call. (JA at 7.) The court noted no other allegations that Lt Col Mahmud "acted" as trial counsel. (JA at 7.)

The Air Force Court next found that "there was no material factual controversy in dispute," since Lt Col Mahmud admitted discussing what information would be included in the stipulation. (JA at 7.) Instead, the only dispute was the extent of his "insistence" regarding the terms, which was "not the material point." (JA at 7.) Deeming Capt Cox's post-trial objection to Lt Col Mahmud's post-trial involvement as a question of law rather than a factual dispute, the court justified Lt Col Mahmud's post-trial involvement by noting that SJAs are required to advise convening authorities on allegations of legal error. (JA at 7 (citing R.C.M. 1106(d)(4)).)

The Air Force Court further opined that Lt Col Mahmud did not have "anything other than an official interest in the case," and that the stipulation of fact discussion was closely related to the negotiation of the PTA—a "negotiation an SJA is expressly

authorized to participate in." (JA at 7-8 (citing *See,* R.C.M. 705(d)(1)).) The court then distinguished between the actions of Lt Col Mahmud and those of other legal officers found to be disqualifying, and noted no other decisions by this Court or others where an "SJA's participation in the creation of a stipulation of fact required by a PTA resulted in the SJA's disqualification." (JA at 8.)

Finally, the Air Force Court determined that even if Lt Col Mahmud were disqualified, there was no colorable showing of prejudice. (JA at 9.) As justification for this conclusion, the court observed that the government could have offered evidence of AB Chandler's myriad uses through the investigators who interviewed him. (JA at 9.)

Yet, despite ruling against AB Chandler, the Air Force Court felt the need to admonish Lt Col Mahmud:

> [W]e do not indorse Lt Col Mahmud's direct participation in negotiating the content of the stipulation of fact. It is not clear from the record why Lt Col Mahmud felt the need to do so, as opposed to participating by communicating with trial counsel; but in doing so he created a risk the conversation might have blossomed into a material factual dispute or legal controversy with the Defense that would have been disqualifying.

(JA at 9.)

In a dissenting opinion, Judge Key disagreed with nearly every conclusion made by the majority. First, Judge Key found that Lt Col Mahmud "personally took over trial counsel's task of negotiating the specific terms that would be included in the stipulation of fact, directly shaping the evidence presented to the military judge." (JA at 15.) Observing that a stipulation of fact is a prosecution exhibit at trial, Judge Key opined that requiring "the inclusion of specific terms in a stipulation is analogous to making a decision as to what evidence to offer at trial—a function of trial counsel." (JA at 16 (citing R.C.M. 502(d)(5) Discussion).)

Judge Key next acknowledged that while SJAs are permitted to initiate PTAs, the PTA in this case required only that AB Chandler enter into a "reasonable" stipulation of fact, not one that required specific terms. (JA at 16.) Judge Key explained that this is both common and intentional, as "calling for the admission of evidence designed to enhance an accused's punishment at trial" could undercut a convening authority's impartiality and thereby disqualify him/her from later taking action. (JA at 16.) Consequently, the "specifics" of a stipulation of fact "are left to be

negotiated by the trial counsel in the same manner as which trial counsel determines what evidence to introduce at trial." (JA at 16.)

Judge Key also challenged the assertion that Lt Col Mahmud had no personal interest in the matter, noting that the evidence sought to be introduced by Lt Col Mahmud "dramatically changed the scope of the misconduct that would be presented to the military judge." (JA at 16-17.) Correspondingly, Judge Key determined that the extent of Lt Col Mahmud's pretrial negotiations was indeed a material factual matter in dispute, as "the degree and nature of [his] involvement . . . go to the heart of whether he had other than an official interest in the case." (JA at 17.) Lt Col Mahmud's later attempt to downplay his role in securing AB Chandler's concessions further demonstrated his personal interest in the case's outcome. (JA at 17.)

Finally, Judge Key disagreed with the majority's assessment that there was a lack of prejudice. Noting the availability of potential relief, along with Lt Col Mahmud failure to reference how AB Chandler took "exceptional risk for his safety and well-being" as a CI, Judge Key could not "confidently conclude an impartial staff judge advocate would have made the same recommendation or that

a convening authority advised by such an impartial staff judge advocate would not have granted Appellant some degree of sentence relief." (JA at 18.)

Summary of Argument

Lt Col Mahmud was disqualified from advising the convening authority on post-trial matters for at least four reasons: (1) he performed a function of trial counsel by directly shaping the evidence that was presented to the military judge in a prosecution exhibit; (2) his actions reflected a personal interest in the case; (3) there was a legitimate factual controversy over his pretrial conduct; and (4) his conduct created the appearance of unfairness during the post-trial process. Due to the availability of relief in clemency, as well as the significant mitigating factors present in the case, AB Chandler was prejudiced by Lt Col Mahmud's refusal to disqualify himself from the post-trial proceedings. Thus, AB Chandler is entitled to relief and his case should be remanded for new post-trial processing involving an impartial SJA.

Argument

THE STAFF JUDGE ADVOCATE NEGOTIATED THE INCLUSION OF AGGRAVATING EVIDENCE IN A STIPULATION OF FACT. OVER DEFENSE

OBJECTION, AND AFTER DISPUTING THE DEFENSE'S VERSION OF EVENTS, THE STAFF JUDGE ADVOCATE PROVIDED POST-TRIAL ADVICE TO THE CONVENING AUTHORITY. THE STAFF JUDGE ADVOCATE'S PRETRIAL CONDUCT WARRANTED DISQUALIFICATION.

Standard of Review

Whether Article 6(c), UCMJ, and R.C.M. 1106(b) disqualify an individual from acting as the SJA during post-trial processing is a question of law reviewed de novo. *United States v. Stefan,* 69 M.J. 256, 258 (C.A.A.F. 2010) (citing *United States v. Taylor*, 60 M.J. 190, 194 (C.A.A.F. 2004)). To find reversible error, an appellant must "make 'some colorable showing of possible prejudice.'" *Id.* at 259 (citations omitted).

Law and Analysis

Article 6(c), UCMJ, 10 U.S.C. § 806, and R.C.M. 1106(b) preclude individuals who have served as trial counsel or assistant trial counsel from later acting as the SJA to any reviewing authority in the same case. An SJA may also disqualify himself or herself from the post-trial review process through certain actions; for example, by having other than an official interest in the case, having to review his/her own pretrial actions when the correctness of that action has

been placed in issue (*see* R.C.M. 1106(b), Discussion), or by performing the duties of a trial counsel or assistant trial counsel. *See Stefan*, 69 M.J. at 258 (citing *United States v. Mallicote*, 13 C.M.A. 374, 376 (1962)). "The general principle underlying R.C.M. 1106(b) on disqualification is that the legal officer or staff judge advocate providing a recommendation to the convening authority must be neutral." *United States v. Rice*, 33 M.J. 451, 453 (C.A.A.F. 1991). Moreover, an SJA who performs post-trial reviews must not only be objective, but appear to be so. *See*, *e.g.*, *United States v. Dresen*, 47 M.J. 122, 124 (C.A.A.F. 1997) (citing *United States v. Newman*, 14 M.J. 474, 482 (C.M.A. 1983); *United States v. Collins,* 6 M.J. 256, 257-58 (C.M.A. 1979); *United States v. Engle*, 1 M.J. 387, 389 (C.M.A. 1976)). Consequently, courts of appeal strictly apply Article 6(c), UCMJ, 10 U.S.C. §806(c), and by extension R.C.M. 1106(b), "to assure the accused a thoroughly fair and impartial review." *United States v. Edwards*, 45 M.J. 114, 115 (C.A.A.F. 1996) (quoting *United States v. Lynch,* 39 M.J. 223, 228 (C.M.A. 1994) (citing *United States v. Crunk*, 4 U.S.C.M.A. 290, 293 (C.M.A. 1954))).

1. Lt Col Mahmud performed the duties of trial counsel in the case.

R.C.M. 705(d)(1) permits an SJA to "initiate" pretrial negotiations. However, there is no similar authority regarding stipulations of fact, which are separate and distinct from pretrial agreements. *See*, *e.g.*, R.C.M. 705(c)(2)(A) (providing that entrance into a stipulation of fact may be a condition of a pretrial agreement); *see also* JA at 179 (indicating that among the terms in the pretrial agreement was AB Chandler entering into a reasonable stipulation of fact); *United States v. Dean*, 67 M.J. 224 (C.A.A.F. 2009) (addressing whether a stipulation of fact violated the terms of a pretrial agreement). Whereas a pretrial agreement is a charging and liability covenant between an accused and a convening authority (*see* R.C.M. 705(a)), a stipulation of fact is an evidentiary arrangement between the trial counsel, the defense counsel, and the accused. *See* R.C.M. 811(a) (allowing only the parties at trial to enter into evidence stipulations); *see also* JA at 123-124 (demonstrating that the Stipulation of Fact was agreed to by trial counsel, assistant trial counsel, trial defense counsel, and AB Chandler)). By its very nature, a stipulation of fact relieves the government of its responsibility to

call witnesses and present evidence. Notably, it is entered into the record as a *prosecution* exhibit.

Determining the scope and breadth of evidence the government will introduce to prosecute an accused is the sole responsibility of a trial counsel. R.C.M. 502(d)(5). If an SJA chooses to perform the duties of a trial counsel, then that SJA is disqualified from further advising the convening authority. *See Stefan*, 69 M.J. at 259 (citing *Mallicote*, 13 U.S.C.M.A. at 376); *cf. United States v. Kennedy*, 8 M.J. 577, 580 (A.C.M.R. 1979) (opining that where an SJA has allied himself with the prosecution, he is disqualified from thereafter advising on the case) (citing *United States v. Albright*, 26 C.M.R. 408 (1958); *United States v. Cash*, 31 C.M.R. 294 (1962); *United States v. Sierra-Albino*, 48 C.M.R. 534 (1974)).

In the present case, it is undisputed that Lt Col Mahmud directly "participat[ed] in negotiating the content of the stipulation of fact." (JA at 9.) Whether he insisted on the inclusion of certain facts, or implied that the PTA would be disapproved if it failed to reference such facts, the goal was the same: to "shap[e] the evidence presented to the military judge." (JA at 15.) As aptly articulated by Judge Key in his dissent, "the inclusion of specific terms in a

stipulation is analogous to making a decision as to what evidence to offer at trial—a function of trial counsel." (JA at 16 (citing R.C.M. 502(d)(5) Discussion).) By inserting himself into this process, Lt Col Mahmud "stepped into the shoes of trial counsel" (JA at 16) and thus disqualified himself from providing post-trial advice to the convening authority. *See* Article 6(c), UCMJ, 10 U.S.C. § 806(c); R.C.M. 1106(b); *Stefan*, 69 M.J. at 258; *cf. United States v. McNeil*, 37 C.M.R. 604, 605 (A.B.R. 1966) (noting trial counsel's lack of involvement in negotiating a pretrial agreement and stipulation of fact was one of several factors indicating the trial counsel – who later served as the post-trial SJA – did not participate in the prosecution of the case).

2. Lt Col Mahmud's actions reflect a personal interest in the case.

Lt Col Mahmud claimed he called Capt Cox in his capacity as the "senior legal advisor to the convening authority," and that he "did not necessarily care whether there was a PTA or a litigated trial." (JA at 32.) He further attested that he became involved "due to the inability of counsel to agree" on terms of the stipulation. (JA at 32.) As a starting point, if Lt Col Mahmud did not care whether there was PTA, then there would be no reason to take the unusual step of

personally participating in the pretrial negotiations.[1] He would have just accepted that counsel could not agree on terms and prepared for a litigated trial.[2] Instead, Lt Col Mahmud chose "to bring his own powers of persuasion to the negotiation," denoting not just his personal interest in securing a PTA, but a desire to present "a larger scope of misconduct to the military judge." (JA at 15, 17.) As highlighted by Judge Key, the particular facts that Lt Col Mahmud sought to be included in the stipulation "were not minor adjustments." (JA at 16.) Rather, they increased the number of AB Chandler's drug uses "from the single digits to nearly 200," and in the process "dramatically changed the scope of the misconduct that would be presented to the military judge for use in determining an appropriate sentence." (JA at 16.) That Lt Col Mahmud felt compelled to present these facts to the military judge reveal not just

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[1] Capt Cox attested that in his time as a trial defense counsel, Lt Col Mahmud was the only SJA who discussed "what details to include in a stipulation of fact." (JA at 33.) Likewise, if it were normal for an SJA to personally negotiate the terms of a stipulation of fact, the Air Force Court would not have found it necessary to expressly decline to indorse Lt Col Mahmud's conduct. (JA at 9.)

[2] Even the Air Force Court expressed skepticism at Lt Col Mahmud's motivation to negotiate terms in the stipulation of fact, commenting: "It is not clear from the record why Lt Col Mahmud felt the need to do so." (JA at 9.)

a personal interest, but "a determined effort to increase [AB Chandler's] sentence." (JA at 17.)

Lt Col Mahmud further exhibited his personal interest in the case's outcome when he disregarded Capt Cox's objections to his post-trial participation. It should not have been difficult to find a replacement to complete the post-trial recommendation; SJAs frequently have their deputies or others in the office perform this task. Furthermore, given that Lt Col Mahmud took the unusual step in directly participating in pretrial negotiations, he should have recognized that he would be creating both appearance and appellate issues by remaining on the case. Yet, instead of removing any potential taint, Lt Col Mahmud not only chose to advise the convening authority, he declined to reference any of the mitigating factors of the case, including AB Chandler's significant assistance to law enforcement. These are not the actions of an SJA with merely an official interest in the case; rather, they reflect an individual with "a personal stake in maximizing [AB Chandler's] punishment." (JA at 18.)

3. There was a legitimate factual controversy between Lt Col Mahmud and Capt Cox over Lt Col Mahmud's pretrial conduct.

Lt Col Mahmud and Capt Cox disagreed about the nature and scope of Lt Col Mahmud's role in the pretrial negotiations. Capt Cox alleged that Lt Col Mahmud "insisted" that the stipulation of fact include certain terms. (JA at 33; *see also* JA at 24.) Lt Col Mahmud deemed this allegation a "mischaracterization" and attested that he was merely "explaining options."[3] (JA at 32.) As Judge Key observed, "[t]his is not a trivial distinction or matter of semantics—the degree and nature of Lt Col [Mahmud's] involvement in his negotiation of specific terms to be included in the stipulation go to the heart of whether he had other than an official interest in the case." (JA at 17.)

An SJA "must disqualify himself from participating in the post-trial recommendation" when "a legitimate factual controversy exists between the [SJA] and the defense counsel." *Lynch*, 39 M.J. at 228 (citing *United States v. Caritativo*, 37 M.J. 175, 183 (C.M.A. 1993)).

[3] In his clemency affidavit, the defense paralegal corroborated Capt Cox's version of events, stating: "Lt Col Mahmud was wanting us to talk to our client and have him agree to include all 150 uses of cocaine into the stipulation of fact." (JA at 27.)

The difference in the accounts of the phone call between Lt Col Mahmud and Capt Cox was a legitimate factual controversy. By failing to recuse himself from post-trial matters, Lt Col Mahmud put himself "in the untenable position of having to review both the factual circumstances of his own actions and legal questions arising from the same." (JA at 17.)

4. Lt Col Mahmud's conduct created the appearance of unfairness.

As the individual providing a post-trial recommendation to the convening authority, Lt Col Mahmud was required to be neutral and objective. *Rice*, 33 M.J. at 453; *Dresen*, 47 M.J. at 124. He was also required to *appear* to be so. *Dresen*, 47 M.J. at 124. Nevertheless, Lt Col Mahmud refused a defense request to recuse himself from post-trial processing despite having personally negotiated the inclusion of significantly aggravating facts in a prosecution exhibit. To make matters worse, Lt Col Mahmud then chose to remain on the case after receiving a clemency package that he believed mischaracterized his pretrial conduct. Given these facts, there is at least an appearance that Lt Col Mahmud aligned himself with the government by ensuring the military judge was presented with

evidence designed to increase AB Chandler's sentence, and then refused to recuse himself despite his belief that the defense had maligned him. A reasonable observer to this case would surely question whether AB Chandler received a fair chance at clemency.

5. AB Chandler was prejudiced by Lt Col Mahmud's post-trial involvement.

The threshold for prejudice is low and requires only a "colorable showing of possible prejudice." *Stefan,* 69 M.J. at 259 (citations omitted). This standard has generally been applied liberally in cases involving post-trial errors, as appellate courts frequently give appellants the benefit of the doubt. *See*, *e.g.*, *United States v. Lee*, 52 M.J. 51, 53 (C.A.A.F. 1999) (citations omitted).

AB Chandler's case involved significant mitigating evidence, ranging from his exposure to drug and alcohol use at an early age, to the sexual trauma he endured as both a child and then again as a young Airman. (JA at 174-175.) AB Chandler also readily confessed to his drug use and took numerous steps towards recovery. (JA at 161-163.) Perhaps most notable, however, is the extreme risk AB Chandler took on behalf of law enforcement when he worked as a CI. (JA at 173.) Lt Col Mahmud did not reference any of these matters

in great detail in his clemency recommendation to the convening authority. Given that the defense believed the convening authority to be a "very reasonable man" (JA at 33), and that clemency relief was available in the form of confinement reduction, an appellate court should not be confident that "an impartial staff judge advocate would have made the same recommendation [as Lt Col Mahmud] or that a convening authority advised by such an impartial staff judge advocate would not have granted [AB Chandler] some degree of sentence relief." (JA at 18.)

Conclusion

This Honorable Court should reverse the Air Force Court of Criminal Appeals decision and remand the case for new post-trial processing involving an impartial SJA.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on May 20, 2020.

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